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No. 91-1132

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FREEPORT-MCMORAN INC., *et al.*,
Petitioners,

v.

K N ENERGY, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AMERICAN MINING CONGRESS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is a federal appellate court that reviews a decision arising under federal diversity jurisdiction obligated to follow state substantive law?

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INTEREST OF AMICUS CURIAE

The American Mining Congress files this brief *amicus curiae* pursuant to Rule 37.2 of the rules of this Court. Petitioners Freeport-McMoRan Inc., *et al.*, and respondent K N Energy, Inc., have consented to the filing of this brief.

Founded in 1897, the American Mining Congress is an industry association that encompasses (1) producers of most of America's metals, coal, industrial

and agricultural minerals; (2) manufacturers of mining and mineral processing machinery, equipment and supplies; and (3) engineering and consulting firms and financial institutions that serve the mining industry. Petitioner Freeport-McMoRan is a member.

The American Mining Congress is both a clearinghouse for information and a coordinator for action on behalf of the mining industry in the nation's capital. It keeps its members informed on matters pending in Congress, the Executive Branch and independent agencies, and works for constructive policies that will best enable the mining industry to serve the needs of the nation. It also marshals the cooperative endeavors of mine operators and equipment manufacturers in the interest of progress throughout the industry. In this regard, it vigorously promotes continuing modernization of mine operations and equipment to enhance safety, health, efficiency and product quality.

Members of the American Mining Congress operate in interstate commerce and from time to time litigate in the federal courts under diversity jurisdiction. Because they are involved in interstate commerce, members of the American Mining Congress are among the intended beneficiaries of federal diversity jurisdiction. "There is little doubt that the development of commerce has been aided by the existence of diversity jurisdiction. . . ." 1 J. Moore, J. Lucas, H. Fink, D. Weckstein & J. Wicker, *Moore's Federal Practice* ¶ 0.71[3.-2] at 701.33.

This past Term the American Mining Congress supported the petition of Freeport-McMoRan for another writ of certiorari in this case. There, the same panel of the U.S. Court of Appeals for the Tenth Circuit

that decided the case at bar had dismissed the suit holding that the addition of a non-essential, non-diverse affiliate destroyed diversity jurisdiction. This Court granted the writ and summarily reversed. *Freeport-McMoRan Inc. v. K N Energy, Inc.*, 111 S. Ct. 858 (1991) (per cur.), *rev'g McMoRan Oil and Gas Co. v. K N Energy, Inc.*, 907 F.2d 1022 (10th Cir. 1990).

Just as the court of appeals' decision in that earlier case threatened the stability and predictability of federal diversity jurisdiction, so the decision by that court in this case threatens the stability and predictability of the rules of decision that apply in cases decided under federal diversity jurisdiction. This issue is of strong and abiding concern to the membership of the American Mining Congress.

REASONS FOR GRANTING THE WRIT

The decision below conflicts with *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). It does not conflict with that decision at its margins. It does not involve nice questions relating to the substance-procedure distinction or the interrelation of the Federal Rules of Civil Procedure and state law; the question of law faced by the court below is substantive by anyone's definition. *See Hanna v. Plumer*, 380 U.S. 460 (1965); *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). Nor does the decision below purport to interpret the Constitution of the United States or any federal statute. Rather, the question addressed by the court is solely a matter of state law: whether the words "terms" and "conditions" in the phrase "terms and conditions" are interchangeable *salva veritate*. And under *Erie* that issue falls squarely within the province of state law.

Yet the court below made no attempt to apply state law. It cited no state authority, discussed no state cases, failed even to inquire which state's law applies. Indeed, the result reached by the court conflicts with state substantive law. The decision below therefore conflicts with *Erie*. In the exercise of its supervisory jurisdiction, this Court should reverse.

All of the principles underlying *Erie* stand as reasons for granting the writ and reversing the decision of the Tenth Circuit. By implicitly sanctioning two conflicting rules of law within a state—federal and state—the decision below undermines the certainty of legal rule that is a prerequisite to vigorous commerce. The decision promotes forum shopping and the inequities in administering justice that result from forum shopping. It also conflicts with federalism by permitting the intrusion by federal courts in state substantive matters. Finally, the decision imprudently encourages expansive use of the federal courts sitting in diversity.

The pragmatic justification for *Erie* is that it is patently undesirable to maintain conflicting sets of legal rules within a state. *E.g.*, *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941); *Hanna v. Plumer*, 380 U.S. 460, 468 (1965). Yet this is precisely what the Tenth Circuit has done. Before the court issued its decision, one could answer the question whether in Colorado the words "terms" and "conditions" are interchangeable. Now one can give only a conditional response: it depends on whether the litigation takes place in the state or the federal courts.

For firms that conduct business in interstate commerce the problem is one of cost. It is inefficient and ultimately costly to do business in a state under two

sets of legal precedents. Apart from considerations of cost, conflicting results in the state and federal systems are quite naturally viewed as unfair.

Another motivating force behind *Erie* is federalism, and the decision below conflicts with the principle of federalism. In *Erie*, that principle takes the following form: "There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts." 304 U.S. at 78. Years later Justice Harlan commented: "I have always regarded [*Erie*] as one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of judicial power between the state and federal systems." *Hanna v. Plumer*, 380 U.S. at 474 (Harlan, J., concurring). *See* Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U.L. Rev. 383 (1964). The decision below alters that allocation.

Yet another idea implicit in *Erie* is the undesirability of expanding the role of the federal courts in cases decided under state law. Creation of substantive rules in federal court that are at variance with the rules applied in state courts simply invites parties to litigate in federal courts unnecessarily. The decision below encourages unnecessary reliance on federal courts.

The duty to apply state law imposed by *Erie* includes a concomitant duty to ascertain what that law is. *E.g.*, *West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 237 (1940); *Huddleston v. Dwyer*, 322

U.S. 232, 236 (1944). *Erie* did not "free the federal courts from the duty of deciding questions of state law in diversity cases. Instead it placed on them a greater responsibility for determining and applying state laws in all cases within their jurisdiction in which federal law does not govern." *Meredith v. City of Winter Haven*, 320 U.S. 228, 237 (1943).

The court below acknowledged that the issue it faced was a matter of contract interpretation: "[T]his is a contract case in which we muster all of the tools of contract interpretation to decide what the parties meant. . . ." Pet. App. A, 4. The court then ruled that "in the nomenclature of contract law" the word "terms" is not interchangeable with "conditions" and that the event of deregulation was an "agreed upon term" under the contract at issue. *Id.* at 7. Not once did the court advert to state law.

The only authority cited by the court was the *Restatement (Second) of Contracts* § 5 (1981). A *Restatement* section, of course, may be adopted by a state. In the present instance, however, neither Colorado nor Montana—the apparently relevant states—has adopted the *Restatement* section, nor did the court below suggest that either state had.

The court below did not say either that it had ignored state law or that it had applied federal general common law. But the decision itself shows that the court failed to apply state law, because the court's holding contradicts the law of the only two states whose substantive rules are potentially applicable under *Klaxon* and state conflicts law. Pet. 7, 8 nn.8, 9. One is left with the brute fact that the court applied its own law.

Erie, now more than fifty years old, has a well-known legacy of interpretive decisions and scholarly commentary. *See, e.g.*, Clark, *State Law in Federal Courts*, 55 Yale L.J. 267 (1974); Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693 (1974); Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U.L. Rev. 383 (1964); Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489 (1954). Every nuance of the case has been analyzed.

This petition, however, raises an issue that is neither subtle nor arcane: must an appellate court reviewing a decision arising under diversity jurisdiction apply state substantive law? The essence of *Erie* is that it does; the apparent inability of the court below to answer this question correctly compels this Court to grant petitioners' writ.

CONCLUSION

For the reasons presented, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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